

1950

c 109 Dower Act

Ontario

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CHAPTER 109

The Dower Act

RIGHT TO DOWER

1. A widow, on the death of her husband, may tarry in his chief house for 40 days after his death, within which time her dower shall be assigned her, if it has not been assigned her before, and in the meantime she shall have her reasonable maintenance, and for her dower shall be assigned to her the third part of all the lands of her husband whereof he was seized at any time during coverture, except such thereof as he was so seized of in trust for another. R.S.O. 1937, c. 112, s. 1. Dower and quarantine.

2. A widow wrongfully deforced of dower or quarantine may recover damages for such deforcement against the deforcer. R.S.O. 1937, c. 112, s. 2. Damages for deforcement.

3. Where a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower at common law, and such interest, whether wholly equitable or partly legal and partly equitable, is or is equal to an estate of inheritance in possession, other than an estate in joint tenancy, his widow shall be entitled to dower out of such land. R.S.O. 1937, c. 112, s. 3. Dower out of equitable estates.

4. Where a husband has been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband did not recover possession thereof, but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced. R.S.O. 1937, c. 112, s. 4. Dower where husband had a right of entry.

WHERE NO DOWER

5. Dower shall not be recoverable out of any separate and distinct lot, tract or parcel of land which, at the time of the alienation by the husband or at the time of his death, if he died seized thereof, was in a state of nature and unimproved by clearing, fencing or otherwise for the purposes of cultiva- Land in state of nature.

tion or occupation; but this shall not restrict or diminish the right to have woodland assigned to the dowress under section 29, from which it shall be lawful for her to take firewood necessary for her own use, and timber for fencing the other portions of the same lot, tract or parcel assigned to her. R.S.O. 1937, c. 112, s. 5.

Mining land. **6.** No dower shall be recoverable out of any land which has been heretofore or is hereafter granted by the Crown as mining land in case such land is, on or after the 31st day of December, 1897, granted or conveyed to the husband of the person claiming dower and he does not die entitled thereto. R.S.O. 1937, c. 112, s. 6.

Land dedicated for streets. **7.** Land dedicated by the owner thereof for a street or public highway shall not be subject to any claim for dower by the wife of the person by whom the same was dedicated. R.S.O. 1937, c. 112, s. 7.

Dower forfeited by elopement with adulterer. **8.** Where a wife willingly leaves her husband and goes away, and continues with her adulterer, she shall be barred forever of her action to demand her dower that she ought to have of her husband's land, unless her husband willingly and without coercion be reconciled to her and suffer her to dwell with him; in which case she shall be restored to her action. R.S.O. 1937, c. 112, s. 8.

BAR OF DOWER

Effect of bar of dower in mortgages. **9.—(1)** No bar of dower contained in any mortgage or other instrument intended to have the effect of a mortgage or other security upon land shall operate to bar such dower to any greater extent than is necessary to give full effect to the rights of the mortgagee or grantee under such instrument.

Wife's right to dower in surplus of purchase money arising from sale under mortgage. **(2)** Where land comprised in such mortgage or other instrument is sold under any power of sale contained therein or under any legal process, the wife of the mortgagor or grantor who has so barred her dower in such land shall be entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money was derived had the same not been sold and, except where the mortgage or other instrument is for the purchase money of the land, the amount to which she is entitled shall be calculated on the basis of the amount realized

from the sale of the land and not upon the amount realized from the sale over and above the amount of the mortgage only. R.S.O. 1937, c. 112, s. 9.

(NOTE—*As to the right to dower in land subject to The Land Titles Act where land acquired subject to a charge, or where owner, after charging land, marries, see Rev. Stat., c. 197, s. 46.*)

10.—(1) A mortgagee or other person holding any money out of which a married woman is dowable under section 9 may pay the same into the Supreme Court to the credit of such married woman and the other persons interested therein. Payment of money into Court.

(2) The court may, on a summary application, make such order as may be deemed just for securing the right of dower of a married woman in any money out of which she is dowable. Order for securing right of dower.
R.S.O. 1937, c. 112, s. 10.

11. A widow shall not be entitled to take her interest in money under section 9, and, in addition thereto, a share of the money as personal estate. Widow's election. R.S.O. 1937, c. 112, s. 11.

12. A person whose wife is of unsound mind and confined in an institution under *The Mental Hospitals Act* at the time he becomes the owner of any land, may at any time while his wife is so confined sell and convey or mortgage such land, freed and discharged of any claim of his wife for dower therein. Sale, etc., free from dower. Rev. Stat., c. 229.
R.S.O. 1937, c. 112, s. 12.

13.—(1) Where the wife of an owner of land,

- (a) has been living apart from him for two years under such circumstances as disentitle her to alimony; or
- (b) is of unsound mind and confined as such in a hospital for mentally ill, mentally defective or epileptic persons,

Where wife living apart from her husband.

and such owner is desirous of selling or mortgaging the land free from dower, a judge of the Supreme Court, or a judge of the county or district court of the county or district in which such owner resides, on application by him, may, by an order to be made in a summary way, upon such evidence as to the judge may seem meet, and upon notice to be served personally, dispense with the concurrence of the wife for the purpose of barring her dower.

Service of
notice of
application
to judge.

(2) Where for any reason notice cannot be served personally, the order may be made after notice has been served upon the Public Trustee and in such other manner as the judge may direct.

Order, form
and contents.

(3) The judge shall, unless the wife has been so living apart from her husband under such circumstances as dis-entitle her to dower, ascertain and state in the order the value of such dower, and shall by the order direct that the amount thereof shall be paid into court or shall remain a charge upon the land or be secured otherwise for the benefit of the wife or be paid or applied for her benefit as he may deem best.

Conveyance
or mortgage
after order.

(4) After the making of the order a conveyance or mortgage by the owner, expressed to be free from his wife's dower, shall, subject to the terms and conditions mentioned in the order, be sufficient to bar her right thereto.

When agree-
ment for sale
executed by
husband or
part of pur-
chase money
retained.

(5) This section shall extend to any case in which an agreement for sale has been made, or a conveyance executed by the husband, and part of the purchase money retained by the purchaser on account of dower or an indemnity given against such dower, and in any such case the application may be made by any person interested in the land, the purchase money retained or the indemnity.

Where wife
is an infant
or of un-
sound mind.

Rev. Stat.,
c. 229.

(6) Where the wife is an infant or a person of unsound mind, notice of the application shall be served on the Official Guardian except where such person is confined in an institution under *The Mental Hospitals Act*, in which case the notice shall only be served on the Public Trustee.

Fee.

(7) On every such application a fee of \$5 shall be payable in law stamps, and no other fee or charge of any kind shall be payable in respect thereof, except that for filing the affidavits and papers the proper officer shall charge the same fees as for filing papers in other cases, which in the Supreme Court shall be paid in law stamps. R.S.O. 1937, c. 112, s. 13.

Application
where wife is
mentally ill
but not
confined in
an hospital.

14.—(1) Where the jail surgeon of a county or district in which a married woman, who is not confined in a hospital for mentally ill, resides, and another medical practitioner to be named by the judge, each certifies (Form 1) that he has personally examined such married woman and that he is of opinion that she is mentally ill, and a judge of the county or district court of the county or district in which such married woman resides, or a judge of the Supreme Court, also certifies (Form 2) that he has personally examined such married

woman, and that from such examination and from the evidence adduced before him, if he thinks it expedient to hear evidence, he is of opinion that such married woman is mentally ill, the judge may make the like order as is authorized by section 13.

(2) The examination and certificates required by this section shall not be acted upon by the judge unless all are made within a period of one month, and the application shall not be entertained unless it is made within one month after the day upon which the last of such examinations took place. R.S.O. 1937, c. 112, s. 14.

Interval between examination and application.

15. Where a judge makes an order under either section 13 or section 14 with reference to any parcel of land, he may afterwards make orders in respect of other sales or mortgages by the husband on the evidence adduced on the first application and on other evidence which satisfies him of the continued mental illness of the wife. R.S.O. 1937, c. 112, s. 15.

Subsequent orders by judge as to other sales or mortgages.

16. Where the owner of land has become bankrupt and it is sought to sell such lands in order to wind up his estate, and the wife of such owner will not release her dower, the trustee or assignee in bankruptcy may apply to a judge of the Supreme Court or to a judge of the county or district court of the county or district in which the lands are situate, for an order enabling him to convey the land free from the dower of such wife, and the order may be made subject to the like conditions and upon the like proceedings as are provided for in section 13. R.S.O. 1937, c. 112, s. 16.

Bar of dower on sale in bankruptcy.

17.—(1) Where the wife of an owner of land has been living apart from her husband for five years or more, and the husband sells and conveys, or has sold and conveyed the land, or mortgages, or has mortgaged the same, the wife not having joined in the conveyance or mortgage, and the purchaser or mortgagee not having had notice that the grantor or mortgagor had a wife living at the time, such purchaser or mortgagee may during the lifetime of the grantor or mortgagor apply to a judge of the Supreme Court or to a judge of the county or district court of the county or district in which he resides for an order enabling him to convey or mortgage the land free from the dower of such wife, which may be obtained subject to the like conditions and by the like proceedings as are provided by section 13.

Where wife of vendor or mortgagor has been living apart from husband for five years.

(2) A person claiming under the grantee or mortgagee shall be entitled to apply in like manner and obtain like relief founded on the right which such grantee or mortgagee

Relief of persons claiming under grantee or mortgagee.

had, or on the applicant's own interest having been acquired by purchase for value in good faith without notice that such owner had a wife at the time of the conveyance or mortgage. R.S.O. 1937, c. 112, s. 17.

Registration
of order.

18.—(1) An order under any of the preceding sections may be made in duplicate or in as many parts as are necessary, and shall be signed by the judge, and may be registered in the registry office of the registry division wherein the land to which the same relates is situate, upon its production and deposit, without any proof thereof, and such registration may take place either before or after the execution of the conveyance or mortgage made in pursuance of such order.

Order may
be endorsed
on deed.

(2) The order may be endorsed or written upon the conveyance or mortgage, in which case it shall be registered as part thereof.

Fee for
registration
of order.

(3) For the registration of the order, including all necessary entries and certificates, the registrar shall be entitled to a fee of \$1, unless the order is endorsed or written upon the conveyance or mortgage, in which case no fee shall be payable in respect of the registration thereof.

Description
of land in
order.

(4) If the order is endorsed or written upon the conveyance or mortgage, the land may be described in the order by reference to the description contained in the conveyance or mortgage. R.S.O. 1937, c. 112, s. 18.

Wife joining
in deed with-
out releasing
dower.

19. Where a wife has joined or hereafter joins in a conveyance or mortgage purporting to convey or mortgage land, or has signed or signs, otherwise than as a witness, a conveyance or mortgage by which her husband conveys or mortgages or purports to convey or mortgage land, but the conveyance or mortgage contains no words purporting to release her dower or other estate or interest in the land, the conveyance or mortgage shall have the same effect as if it contained a bar of dower by the wife and she thereby barred her dower in the land. R.S.O. 1937, c. 112, s. 19; 1941, c. 55, s. 10.

Married
women
under 21
barring
dower.

Rev. Stat.,
c. 197.

20. A married woman under 21 years of age and of sound mind may bar her dower in any land by joining with her husband in a deed or conveyance thereof to a purchaser for value or to a mortgagee, or in a transfer or charge under the provisions of *The Land Titles Act* in which deed, conveyance, transfer or charge, a release or bar of her dower is contained, and she may in like manner release her dower to any person to whom such land has been previously conveyed. R.S.O. 1937, c. 112, s. 20.

ASSIGNMENT OF DOWER

21. The dowress and the tenant of the freehold may, by an instrument under their hands and seals, executed in the presence of two witnesses, agree upon the assignment of dower, or upon a yearly or gross sum of money to be paid in lieu and satisfaction of dower, and the instrument may be registered in the proper registry office by filing the same or a duplicate thereof, verified by the affidavit of one of the subscribing witnesses, and shall entitle the dowress to hold the land so assigned to her against the assignor and all parties claiming through or under him, as tenant for her life, or to distrain for, or to sue for, and recover in any court of competent jurisdiction the yearly or gross sum agreed to be paid to her by the tenant of the freehold, and the instrument so registered shall be a lien upon the land for such yearly or gross sum, and shall be a bar to any action or proceeding by the dowress for dower in the lands mentioned therein. R.S.O. 1937, c. 112, s. 21.

22. Every tenant in possession who is not also tenant of the freehold and who is served with a writ of summons in an action for the recovery of dower shall forthwith give notice thereof to his landlord or other person under whom he entered into possession, under the penalty of forfeiting the value of three years improved rent of the premises in the possession of the tenant, to the person under whom he entered into possession, to be recovered by action in the Supreme Court. R.S.O. 1937, c. 112, s. 22.

23. In estimating damages for the detention of dower or the yearly value of the land, for the purpose of fixing a yearly sum of money in lieu of an assignment of dower by metes and bounds, the value of permanent improvements made after the alienation of the land by the husband or after the death of the husband, shall not be taken into account; but the damages or yearly value shall be estimated upon the state of the property at the time of such alienation or death, allowing for the general rise, if any, in the price and value of land in the particular locality. R.S.O. 1937, c. 112, s. 23.

ASSIGNMENT OF DOWER AFTER JUDGMENT

24. The sheriff, on receipt of the writ of assignment of dower, shall, by writing under his seal of office, appoint two resident freeholders of his county who are rated upon the assessment roll for real estate of a value not less than \$2,000 each, and each of whom would in other respects be eligible

to serve as a juror between the parties named in the writ, and an Ontario land surveyor, to be commissioners to admeasure the dower, and the sheriff shall, in such writing, set out a copy of the writ, and shall name therein a day on or before which the commissioners shall make and return to him a report of their proceedings and determination in the execution of the duty assigned to them. R.S.O. 1937, c. 112, s. 24.

Death, etc.,
of com-
missioners.

25. In the case of the death or refusal to act of any or all of the commissioners so appointed, the sheriff shall, from time to time, in like manner, appoint another or others to perform the duty of any who may die or refuse to act. R.S.O. 1937, c. 112, s. 25.

Oath of com-
missioners.

26.—(1) Every commissioner so appointed shall, before entering upon the execution of his duty, take and subscribe an oath in the following form:

I, , do swear that I am not of kin to the plaintiff (*naming her*) or to the defendant (*naming him*), or in any way interested in the land out of which the assignment of dower is to be made by me, and that I will honestly, impartially, and to the best of my skill and ability, execute and perform the duties imposed upon me by the appointment of....., Sheriff of the County of....., as a Commissioner for the admeasurement of dower between the plaintiff and the defendant according to law.

So help me God.

Return to
sheriff.

(2) The commissioners shall annex to their report the oaths sworn by them, and return them to the sheriff. R.S.O. 1937, c. 112, s. 26.

Powers and
liabilities of
commis-
sioners.

27. After taking and subscribing such affidavit, the commissioners shall, for all purposes in the fulfilment of the duties by law required of them, be considered officers of the court, and shall be entitled to the same immunities and protection and be subject to the same liabilities and proceedings as a sheriff in the discharge of his duty. R.S.O. 1937, c. 112, s. 27.

Attendance
of witnesses.

28.—(1) If either party desires to produce a witness before the commissioners, such party may sue out a subpoena *ad testificandum* or *duces tecum* from the office in which the action was commenced, commanding the attendance of such witness at the time and place appointed by the commissioners.

Payment of
witness.

(2) The person so required to attend shall be entitled to be paid the same fees, allowances and conduct money as if he had been subpoenaed as a witness in an ordinary action. R.S.O. 1937, c. 112, s. 28.

29.—(1) It shall be the duty of the commissioners,

Duties of
commis-
sioners.

- (a) to admeasure, designate and lay off without delay, by sufficient marks, descriptions, boundaries or monuments, one-third of the land mentioned in the writ, according to the nature of the land, whether meadow, arable, pasture or woodland, being a part of the land mentioned in the writ, and having always due regard to the nature and character of the buildings and erections on such land;
- (b) to ascertain and determine what permanent improvements have been made upon the land since the death of the plaintiff's husband, or since he alienated the same to a purchaser for value, and if it can be done they shall award the dower out of such part of the land as does not embrace or contain such permanent improvements; but if that cannot be done, they shall deduct either in quantity or value from the portion to be by them allotted or assigned to the plaintiff in proportion to the benefit she may or will derive from the assignment to her as part of her dower of any part of such permanent improvements.

(2) If from peculiar circumstances, such as there being a mill or manufactory upon the land, the commissioners cannot make a fair and just assignment of dower by metes and bounds, they shall assess a yearly sum of money, being as near as may be one-third of the clear yearly rents of the premises, after deducting any rates or assessments payable thereon, and in assessing such yearly sum they shall make allowances and deductions for permanent improvements, as above provided for, and in their report to the sheriff they shall state the amount of such yearly sum and set forth all the evidence taken by them in relation to the same.

Assessment
of yearly
sum in lieu
of dower.

(3) The evidence shall be taken upon oath, which oath any one of the commissioners is hereby authorized to administer, and shall be reduced to writing and subscribed by the witness.

Evidence
on oath.

(4) Such yearly sum shall be a lien upon the land mentioned in the writ or upon such specific portion thereof as the commissioners may direct, and the same shall be recoverable by distress as for rent or by action against the tenant of the freehold for the time being.

Recovery
of sum
assessed.

(5) The report of the commissioners shall be in writing, signed by them and directed to the sheriff, and shall

Report of
commis-
sioners.

contain a full statement of their proceedings, and, where the dower is assigned by metes and bounds, shall distinctly point out and describe the same, and the posts, stones or other monuments designating the boundaries, and for the purpose of planting and marking the posts, stones or monuments, the commissioners may, if necessary, employ chain-bearers and labourers. R.S.O. 1937, c. 112, s. 29.

Return of writ and report.

30. The sheriff may, in his discretion, upon the request of the commissioners, enlarge the time for making their report for not more than 10 days, and he shall, within 24 hours after the receipt thereof, endorse thereon the day and hour of the receipt, and he shall then forthwith return the writ, together with the report and all papers annexed thereto, to the office wherein the action was commenced. R.S.O. 1937, c. 112, s. 30.

Appeal.

31.—(1) Either party, within a month from the filing of the sheriff's return to the writ, or within such further time as the Supreme Court or a judge thereof may allow, may appeal from the report of the commissioners to a judge in court, upon grounds apparent on the report and papers filed therewith, or may apply to set aside the same, upon other grounds verified by affidavit and set forth in the notice served.

Order of court thereon.

(2) The judge may vary or amend the report, or refer the same back to the commissioners for amendment in whole or in part, with such directions as to law or fact as he may deem proper, or he may confirm or set aside the report and may appoint three new commissioners or direct that the sheriff shall do so, and the new commissioners shall have the same powers and perform the same duties as hereinbefore expressed, and the report of the new commissioners shall be treated as if no other report had been made, and shall be dealt with and proceeded upon accordingly.

Effect of report being appealed from for misconduct, etc.

(3) If the report is moved against upon the ground of misconduct or fraud on the part of the commissioners, the judge may direct that they be added as parties to the proceeding, and if wilful misconduct or fraud is established, the report may be set aside and the commissioners may be adjudged to pay to the parties injured all the costs which have been incurred in respect of proceedings rendered useless by such misconduct or fraud and all the costs of the proceeding to set aside the report.

Costs of appeal.

(4) The appeal or application may be dismissed with or without costs, and the court may order the party at whose

instance or on whose complaint the commissioners have been made parties, to pay the commissioners their costs.

(5) If the appeal or application is dismissed, or if the report is not appealed from or moved against within the proper time, the report shall thenceforth be final and conclusive on all parties to the action of dower, and a copy of the report, certified by the registrar under the seal of the court, may be registered in the proper registry office. R.S.O. 1937, c. 112, s. 31.

Registration
of copy of
report.

32. After such registration the plaintiff shall be entitled to sue out a writ directed to the proper sheriff, commanding him to put her into possession of the land assigned to her for her dower and to levy all such costs as have been awarded to her against the defendant. R.S.O. 1937, c. 112, s. 32.

When writ of
possession
may issue.

33. The commissioners shall each be entitled to receive from the plaintiff the sum of \$5 for each day's attendance, not exceeding two, and the sum of 20 cents for every 100 words for drawing up their report, and may also charge 10 cents for every 100 words of each copy furnished by them to either party. R.S.O. 1937, c. 112, s. 33.

Commis-
sioners' fees.

34. The plaintiff shall pay the costs of suing out and the costs of the commissioners in executing the writ of assignment of dower and making their report, but each party shall pay his own costs of witnesses and of his counsel or solicitor attending before the commissioners. R.S.O. 1937, c. 112, s. 34.

By whom
costs to
be paid.

FORM 1

(Section 14)

CERTIFICATE OF MEDICAL PRACTITIONER

I, the undersigned....., a legally qualified medical practitioner, jail surgeon of the jail of the County (or District) of..... (or as the case may be) residing and practising at..... in the County (or District) of....., do hereby certify that on the..... day of....., 19....., at..... in the County (or District) of..... I, separately from any other medical practitioner, personally examined A. B. of the Township of..... in the County of (or District) of....., wife of C. B., of the Township of..... in the County (or District) of....., and I further certify that the said A. B. is mentally ill and that I have formed this opinion upon the following grounds, namely: (*here state the facts upon which the certificate is based*).

Signed this day of
19....., at in the County of

Witness.....

FORM 2

(Section 14)

CERTIFICATE OF JUDGE

Province of Ontario. }
County (or District) of..... }

I, the undersigned.....
Judge of the County (or District) Court of the County (or District) of
....., do hereby certify that on the
day of....., 19...., I personally examined *A.B.*, of the
..... of..... in the County (or District)
of....., wife of *C.B.*, of the..... of..... in the County
(or District) of....., and that from such personal examination
(and from the evidence of *G.H.* and *J.K.* adduced before me, (*if evidence
has been taken*)) I am of opinion that the said *A.B.* is mentally ill.

Signed this day of....., 19...., at.....
..... in the County (or District) of.....

R.S.O. 1937, c. 112, Form 2.